TESTIMONY OF JUSTIN PIDOT

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HEARING ENTITLED "EXAMINING 'SUE AND SETTLE' AGREEMENTS: PART I"

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INTRODUCTION

Mr. Chairman and Members of the Subcommittees, thank you for giving me the opportunity to testify before you today about environmental litigation and, in particular, about settlements entered into by the government to resolve such litigation.

I am an associate professor at the University of Denver Sturm College of Law and my primary expertise is environmental law, natural resources law, and administrative law. Before joining the faculty at the University of Denver, I was an appellate attorney in the Environment and Natural Resources Division of the U.S. Department of Justice during parts of the Administrations of President George W. Bush and President Barak Obama, and I also served as a deputy solicitor at the U.S. Department of Interior during the last six months of the Obama Administration.

The accusation implicit in the phrase "sue and settle," which is the subject of this hearing and has increasingly been used by certain conservative organizations, is that there is something unseemly or inappropriate about environmental settlements. The accusation is sometimes made that such settlements are collusive. In my experience, this could not be further from the truth. The lawyers who represent the United States, both within Justice and agencies, are among the most dedicated civil servants I have known. As I will discuss, settlements occur because they are conserve federal resources and provide the United States with an opportunity to ameliorate the effects of a likely litigation loss when legal risk is high. Those are the factors that lawyers for the United States consider, and those are the factors that must be demonstrated for a settlement to be approved.

In my testimony today, I will begin by discussing the importance of environmental litigation to achieving the goals that Congress has established in federal environmental laws. Litigation has always been integral to enforcing environmental law and administrative law more generally. Congress created a cause of action to challenge agency decisions—and the failure of agencies to make decisions—when it enacted the Administrative Procedure Act in 1946 (commonly called the APA). And even before that time, courts had permitted lawsuits against agencies as a matter of common law. In many environmental statutes, Congress created more specialized provisions to govern judicial review, which are more suited to a particular legal context.

The ability of the public to hold federal agencies to account is a crucial component to the rule of law. Litigation keeps agencies honest and accountable to the mandates that Congress has established and ensures that agencies both fulfill their affirmative obligations and do not engage in illegal actions. Environmental litigation itself does not negatively affect the economy, states, or local communities. Litigation merely enforces the legal rules that Congress has established by statute, or implementing agencies have established by regulation. Litigation that holds federal agencies accountable is appropriately encouraged by existing provisions that require the federal government in certain circumstances to pay the legal fees of a party that successfully sues the federal government.

The second portion of my testimony will focus on settlements and consent decrees that the federal government enters into to reach a negotiated resolution to environmental litigation. I will refer to both settlements and consent decree in environmental cases simply as environmental settlements.

All the evidence shows that environmental settlements are a good thing. In all areas of law, settlements dominate the American legal landscape. They are favored by courts, attorneys, and parties because they reduce legal costs and allow the parties, where possible, to negotiate a resolution that eliminates the uncertainty about the outcome of a case and allows the parties, rather than a judge or jury, to find a resolution that all sides can live with.

I. THE IMPORTANCE OF ENVIRONMENTAL LITIGATION

In the 1970s and early 1980s, Congress systematically enacted modern environmental law.[1] Almost every modern environmental law includes a provision that allows citizens to file lawsuits against either private parties or the federal government for violating the provisions of those laws.[2] Where environmental laws lack specific citizen suit provisions, the APA authorizes lawsuits challenging many actions taken by the federal government.[3] It is lawsuits brought against the federal government—either pursuant to the specialized provisions that Congress created in specific environmental statues, or pursuant to the general judicial review provisions of the APA—that are the focus of my testimony today.

Congress's innovations, first in the APA and later through environmental citizen suit provisions, promote core American values. These include buttressing the rule of law, enforcing the separation of powers, and promoting fairness.

First and foremost, environmental litigation promotes the rule of law. Lawsuits brought under the APA or citizen suit provide an avenue by which the people can haul government

[1] *See* Barton H. Thompson, Jr. *The Continuing Innovation of Citizen Enforcement*, 2000 UNIVERSITY OF ILLINOIS LAW REVIEW, 185 (2000). For a detailed discussion of the history of U.S. environmental law, *see* RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW (2004).
[2] *See generally* Thompson, *supra* note 1.
[3] *See* 5 U.S.C. 704. The APA authorizes judicial review of "final agency action for which there is no adequate remedy in a court." *Id.* Where an environmental statute contains specific judicial review provisions, those provisions will govern rather than the APA.

agencies before the courts when those agencies have acted in an unlawful manner.[4] The principle that no one, not even the President, is above the law, is a core tenant of American's democracy. In our constitutional system, the legislative power of the federal government is vested in Congress.[5] The President, through the executive branch, is charged with the obligation to "take Care that the Laws be faithfully executed."[6] Environmental litigation is one avenue by which citizens can ensure that the executive branch fulfills the obligations that Congress has established.

Second, environmental lawsuits enforce the separation of powers by simultaneously enforcing Congress's legislative judgments, while providing for only deferential review of executive branch actions taken within the scope of authority delegated by statute. Citizen suits do not authorize citizens or courts to substitute their judgment for the judgment of Congress or federal agencies. To be successful, environmental litigation must be anchored to the legal obligations established by Congress through legislation or by agencies through regulations promulgated pursuant to a statutory delegation of authority. Moreover, the standard of review applied by courts is very deferential to the executive branch.[7] As a former federal lawyer, I witnessed and benefitted from this deference on a consistent basis. So long as a federal agency has a decent argument that its actions conformed to the will of Congress and also accorded with the regulations established by the agency itself, the federal agencies is very likely to prevail. In other words, while aggrieved parties have many opportunities to sue the federal government, to prevail they must overcome a substantial thumb on the scale in favor of the government.

[4] *See* Thompson, *supra* note 1, at 188.
[5] *See* U.S. CONST. Art. I, § 8.
[6] *Id.* Art. 2, § 3.
[7] *See* 5 U.S.C. § 706(2).

Third, citizen suits promote fairness. The causes of action created by the APA and environmental citizen suit provisions allow anyone injured by a federal agency, from the most powerful and sophisticated business, to a solitary citizen, to seek a court order directing the executive branch to comply with its legal obligations. This right to turn to the courts for redress is not, of course, unlimited. Under Article III of Constitution, courts will only hear cases brought by parties with concrete and particularized interests at stake.

Evidence suggests that all manner of individuals and entities, with all manner of interests and political viewpoints, have used citizen suits and the APA to protect their interests and enforce federal law against federal agencies. In a 2011 report, the Government Accountability Office found that Environmental Protection Agency (EPA) faced approximately 150 cases a year. About half of those cases were filed by private companies or trade associations and about 30 percent were filed by either local or national environmental organizations.[8] In other words, the tools that allow environmental litigation should not be seen as ideological.

Before I turn to environmental settlements, let me briefly address an additional aspect of environmental litigation. Fee shifting provisions are a crucial tool to enable such litigation to promote the core American values I have discussed—the rule of law, separation of powers, and fairness. In the absence of such provisions, small businesses, non-profit organizations, and concerned citizens would face substantial economic barriers to bringing lawsuits, even in circumstances where the federal government acted in clear violation of the law.[9] Such a situation would cause an imbalance in the legal landscape because private businesses and trade groups,

[8] U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-11-650, ENVIRONMENTAL LITIGATION: CASES AGAINST EPA AND ASSOCIATED COSTS OVER TIME 13 (2011) (hereinafter "2011 GAO REPORT").
[9] 28 U.S.C. § 2412 (d)(2)(B). EAJA applies to individuals with a net worth of less than $2 million, businesses with a net worth of less than $7 million and that employee less than 500 individuals, and all 501(c)(3) non-profit orgnizations. *Id.*

who already file half of lawsuits against EPA, would often have the financial resources to pay for lawsuits that advance their viewpoint in the absence of fee shifting provisions.[10] In other words, if fee shifting provisions didn't exist, environmental litigation would be transformed from even handed to deeply skewed in favor of the wealthy and powerful.

Some environmental statutes, like the Endangered Species Act,[11] contain their own fee-shifting provisions. Otherwise, the Equal Access to Justice Act (or EAJA) allows a court to award attorneys fees to the prevailing party so long as the position of the United States is not "substantially justified."[12] While fee-shifting provisions have come under attack in recent years,[13] available information suggests that, overall, attorneys fees in environmental litigation impose a relatively slight burden to the taxpayer. In its 2011 report, the Government Accountability Office study found that between 1995 and 2010, EPA paid approximately $1.8 million a year in attorneys fees,[14] which is just over two hundredths of a percent of EPA's budget. Moreover, fee-shifting provisions do not create incentives for frivolous litigation. A party only receives a fee award if that party prevails in the litigation, and if the party seeks fees under EAJA they must further demonstrate that the government's position was not "substantially justified."[15]

II. ENVIRONMENTAL SETTLEMENTS COMPLY WITH THE LAW AND ARE SOUND POLICY

Some environmental lawsuits end in settlements between the federal government and the plaintiff. In recent years, such environmental settlements have been termed the "sue and settle"

[10] Trade groups incorporated under 501(c)(3) may themselves recover EAJA fees.
[11] 16 U.S.C. § 1540(g)(4).
[12] 28 U.S.C. § 2412(d)(1)(A).
[13] *See, e.g.*, The Government Litigation Savings Act, H.R. 3037, 113th Congress.
[14] 2011 GAO REPORT, *supra* note 4, at 19.
[15] *See* Brian Korpics, et al, *Shifting the Debate: In Defense of the Equal Access to Justice Act*, 43 ENVIRONMENTAL LAW REPORTER 10,985, 10,991 (2013).

phenomenon and have generated substantial criticism from certain sectors. This so-called phenomenon was first instigated when the U.S. Chamber of Commerce released a report criticizing the practice in 2013, and has been the focus of numerous hearings like this one.[16] Settlements are, however, central to the American justice system and are ubiquitous. As a result, those that seek to curb or cabin settlement opportunities in this single context should have to demonstrate that environmental settlements involve decidedly different considerations than other types of litigation. And, as I will explain, that case has not been made.

A. *Settlements Are a Central Feature of the American Legal System*

The vast majority of lawsuits in the American justice system settle—by some estimates, between eighty and ninety-two percent of all cases.[17] Moreover, this is widely viewed as a good thing. Settlements preserve judicial resources and allow the parties to reach an agreement, rather than have a resolution imposed by a judge or jury.[18] Given the frequency of settlements, and the strong public policy favoring settlement, it should come as no surprise that the federal government, like any party in civil litigation, sometimes reaches a settlement. The so-called "sue and settle" phenomenon, then, is simply the ordinary course of litigation in the American legal system.

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[16] *See* WILLIAM L. KOVACS ET AL., U.S. CHAMBER OF COMMERCE, A REPORT ON SUE AND SETTLE: REGULATING BEHIND CLOSED DOORS (2013) (hereinafter "CHAMBER OF COMMERCE REPORT"). Shortly after the Chamber of Commerce released its report, the American Legislative Exchange Council and the Center for Regulatory solutions released their own criticisms of environmental settlements. CENTER FOR REGULATORY SOLUTIONS, SUE-AND-SETTLE: REGULATION WITHOUT REPRESENTATION (2014); WILLIAM YEATMAN, AMERICAN LEGISLATIVE EXCHANGE COUNCIL, THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S ASSAULT ON STATE SOVEREIGNTY (2013) (hereinafter "ALEC REPORT").

[17] *See* Jonathan D. Glater, *Study Finds Settling Is Better Thank Going to Trial*, NEW YORK TIMES, Aug. 7, 2008 (citing the author of an empirical study on settlement for the proposition that "[t]he vast majority of cases do settle – from 80 to 92 percent by some estimates").

[18] *See, e.g.*, In re Deepwater Horizon, 739 F.3d 790, 807 (5th Cir. 2014) (rejecting a rule that "would thwart the 'overriding public interest in favor of settlement' that we have recognized"); Bradley v. Sebelius, 621 F.3d 1330, 1339 (11th Cir. 2010) ("Historically, there is a strong public interest in expeditious resolution of lawsuits through settlement.").

B. The Typical Environmental Settlement

Unsurprisingly, most environmental settlements fall into a category of litigation that is generally particularly likely to settle: Circumstances where a defendant has essentially no defense to liability. The circumstance I am referring to is the deadline lawsuit, including deadline lawsuits under the Endangered Species Act and the Clean Air Act, which have stirred some controversy. Of the settlements criticized in the Chamber of Commerce report, more than 80 percent involved deadline lawsuits.[19]

Deadline lawsuits involve the following situation: Congress imposes a strict deadline on a particular agency decision. For example, under the Clean Air Act, EPA has one year to approve a state implementation plan to achieve National Ambient Air Quality Standards,[20] and under the Endangered Species Act, the Fish and Wildlife Service has one year to render a decision on a petition to list a species under the act if that petition includes substantial information indicating that a listing may be warranted.[21] An agency charged with acting within such a strict statutory deadline fails to meet its legal obligations. Someone then files a lawsuit challenging the agency's failure to act.[22]

A lawyer for the government in such a situation—where an agency has violated a clear deadline by which the agency must act—has no good defense to liability.[23] When these lawsuits

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[19] *See* Courtney R. McVean & Justin R. Pidot, *Environmental Settlements and Administrative Law*, HARVARD ENVIRONMENTAL LAW REVIEW 192, 217 (2015); Stephen M. Johnson, *Sue and Settle: Demonizing the Environmental Citizen Suit*, 37 SEATTLE UNIVERSITY LAW REVIEW 891, 913 (2014).
[20] *See* 42 U.S.C. § 7410(k)(2).
[21] *See* 16 U.S.C. 1533(3)(B).
[22] *See, e.g.*, 5 U.S.C. § 706(1) (authoring courts to "compel agency action unlawfully withheld or unreasonably delayed"); 16 U.S.C. § 1540(g)(1)(C) (authoring citizen suits under the Endangered Species Act "where there is alleged a failure of the Secretary to perform any act or duty . . . which is not discretionary with the Secretary").
[23] *See* McVean & Pidot, *supra* note 14, at 202-03; *see also* U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO 15-803T, INFORMATION ON CASES AGAINST EPA AND FWS AND DEADLINE SUITS ON EPA RULEMAKING, at 5 (2015) (hereinafter "2015 GAO REPORT").

don't settle, the government loses them.[24] A judge will then be in a position to impose on the agency a timeline for the agency to meet its legal obligations. And because the government lacks a substantially justified defense, the government will often be obligated to pay the attorneys fees of the party bringing the lawsuit.[25]

I provide this overview of the legal backdrop to the typical environmental settlement because it highlights how ordinary these settlements truly are. Notwithstanding theories that the federal government is engaging in some form of collusion with plaintiffs,[26] in my view the most significant determinant of whether an environmental lawsuit ends in a settlement is a simple one: Do the lawyers representing the federal government believe that the federal government can prevail? Where those lawyers believe that a loss is virtually inevitable, attempting to settle the case is a no brainer.

C. Benefits of Environmental Settlements

Environmental settlements offer numerous benefits, and these benefits are ones that should be embraced by people across the political spectrum. First, such settlements enhance—rather than limit—agency' discretion. In the face of a deadline lawsuit the agency is certain to lose, an agency faces the following choice: Either it can negotiate with the opposing party to establish a mutually agreed upon timeline for the agency's action, or it can wait for judgment and have a judge impose such a deadline.[27] The agency maintains more control over its agenda by

[24] *See* Biodiversity Legal Foundation v. Badgley, 309 F.3d 1166 (9th Cir. 2001); Daniel J. Rohlf, *Section 4 of the Endangered Species Act: Top Ten Issues for the Next Thirty Years*, 34 ENVIRONMENTAL LAW 493, 495 (2004).
[25] *See* 28 U.S.C. § 2412(d)(1)(A).
[26] *See* CHAMBER OF COMMERCE REPORT, *supra* note 11, at 3. The Chamber of Commerce Report implies that evidence of such collusion can be found in the fact that in some circumstances a settlement or consent decree is filed alongside the complaint initiating suit against the agency. *See id.* at 11. This is, however, entirely unsurprising because environmental citizen suit provisions require a party intending to file a lawsuit to provide notice of that lawsuit sixty days before filing. *See* Johnson, *supra* note 14, at 912. In other words, by the time the complaint is filed, the federal government has been on notice of the impending lawsuit for two months and negotiations can occur during that period.
[27] *See* McVean & Pidot, *supra* note 14, at 231-32.

entering into settlement negotiations, rather than allowing a judge to enter an injunction compelling the agency to act within a certain timeframe.[28] This rule—that agencies increase their discretion by settling, rather than litigating—holds true in most cases where an agency is likely to lose. Agencies simply have more control over the terms of settlements than over the terms of a judge's order. Put another way, settlements limit the role of judges in setting federal policy—something which those that oppose "activist" judges should celebrate.

Second, settlements save government resources. These resources largely take the form of staff time at both the Department of Justice, which represents environmental agencies in federal court, and the agency being sued.[29] This savings will be particularly significant where a settlement can be reached early in the life of a lawsuit, and in appropriate circumstances, settlement negotiations can begin even before the filing of a complaint because parties suing the federal government under most environmental statutes must provide notice of their intent to file a lawsuit sixty days before filing a complaint.[30] Conserving the resources of EPA and the Department of Justice is more even more important today, than it has been in recent years, as the agencies face the potential for considerable funding reductions.

Third, settlements save taxpayer dollars by reducing the amount of attorneys fees the federal government has to pay. This savings occurs because, just as settlements reduce the amount of time required by government attorneys, they also reduce the amount of time required by plaintiffs' attorneys. The fewer hours plaintiffs' attorneys spend on a case, the lower the amount of attorneys fees they can demand.

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[28] *See* U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-15-34, ENVIRONMENTAL LITIGATION: IMPACT OF DEADLINE SUITS ON EPA'S RULEMAKING IS LIMITED, at 7 (hereinafter "2014 GAO REPORT") ("[O]fficials [at EPA and Justice] may believe that negotiating a settlement is the course of action most likely to create sufficient time for EPA to complete the rulemaking if it is required to issue a rule.").

[29] *See* Johnson, *supra* note 14, at 934.

[30] 42 U.S.C. § 7604(b) (Clean Air Act sixty day notice requirement); 16 U.S.C. § 1540 (g)(2)(C) (Endangered Species Act sixty day notice requirement); 33 U.S.C. § 1365(b) (Clean Water Act sixty day notice requirement).

Fourth, settlements conserve judicial resources by resolving cases without a judge having to rule on liability and craft a remedy. This frees judges to spend time on matters with unsettled legal questions where the parties cannot reach a resolution between themselves. The importance of this factor too has only increased over time as the federal courts face an increasing backlog of civil litigation.[31]

D. Existing Constraints on Environmental Settlements

In reaching environmental settlements, the government secures the benefits I have discussed, but it does not have carte blanche to do so. There are three sources of safeguards that apply to environmental settlements that I will discuss, and to my mind, these safeguards address any concern that settlements could be used to circumvent agency procedural obligations or allow agencies to take illegal actions.

First, the agencies sued in environmental lawsuits do not themselves possess authority to enter into a settlement. Rather, only appointed and confirmed officials within the Department of Justice can approve settlements.[32] This independent review by lawyers charged with representing the United States as a whole, rather than implementing particular statutes, limits an agency's ability to enter into settlements. An agency has to not only want to enter a settlement, but the agency has to convince lawyers at the Department of Justice that settlement is both appropriate and desirable. Because Department of Justice lawyers will not be driven by the agency's mission, but rather by legal considerations, vesting settlement authority at the Department of Justice significantly limits agencies ability to enter into collusive settlements.

[31] *See* Joe Palazzolo, *In Federal Courts, the Civil Cases Pile Up*, THE WALL STREET JOURNAL, Apr. 6, 2015.
[32] *See* 28 C.F.R. § 0.160(d); *see also* McVean & Pidot, *supra* note 14, at 202. Settlements must either be approved by the Attorney General, the Deputy Attorney General, the Associate Attorney General, or an Assistant Attorney General. All of these positions are subject to Senate confirmation.

Moreover, that settlements must be approved by an Assistant Attorney General, the Associate Attorney General, or the Deputy Attorney General,[33] and at times require consultation with and the consent of the Solicitor General,[34] provide a further check on settlements. Whenever an environmental agency wants to enter a settlement, it must convince these senior officials, and typically the career staff that report to them, that the settlement is in the interests of the United States. These senior Department of Justice officials are highly unlikely to compromise their view of what the law requires because a client agency has a particular agenda it wants to pursue through a settlement.

My experience both as a lawyer at the Department of Justice and at the Department of Interior convinces me that the role the Department of Justice is a very significant factor in the development of settlements. In each case of which I am aware, settlement terms have been subject to considerable scrutiny, both by career lawyers and political leadership, and must be justified based on litigation risk, costs avoided, and the appropriateness of settlement terms.[35]

Second, the Department of Justice has written internal rules that place limitations on the terms that can be contained within settlements. A 1999 memorandum produced by Randolph D. Moss, the Acting Assistant Attorney General overseeing the Office of Legal Counsel, currently guides settlement policy, and that memorandum acknowledges that the Administrative Procedure Act, and other limits on agency decisionmaking processes, constrain the types of commitments

[33] 28 C.F.R. § 0.160 identifies settlements that can be approved by an Assistant Attorney General and those that require approval by the Associate Attorney General or Deputy Attorney General.

[34] The Solicitor General's involvement is necessary if that office has authorized the appeal of an adverse district court ruling before a settlement is developed or if a settlement is inconsistent with an litigation position previously authorized by the Solicitor General.

[35] In 2015, the Government Accountability Office reported that EPA and Justice official described similar factors as governing settlement consideration in the deadline suit context, including "(1) the cost of litigation, (2) the likelihood that EPA will win the case if it goes to trial, and (3) whether EPA and Justice believe they can negotiate a settlement that will provide EPA with sufficient time to complete a final rule if required to do so." *See* 2015 GAO REPORT, *supra* note 21, at 5

that the United States can make through settlements; settlements cannot include terms that circumvent "restrictions on the manner in which the executive branch may adopt and revise regulatory rules and procedures."[36] Moreover, any settlement involving a substantive commitment to take a discretionary decision requires a specific exception granted by the Deputy Attorney General or Associate Attorney General, and in 2015 the Government Accountability Office identified only one such exception as having been granted to EPA.[37]

Third, courts must approve and enforce settlements, and can hear collateral challenges to settlements brought by third parties in some circumstances, and courts have demonstrated their willingness to intervene when a settlement oversteps legal bounds. Judicial intervention can take two forms. First, a court can simply refuse to approve a settlement. For example, in *Conservation Northwest v. Sherman*, the Ninth Circuit refused to allow a consent decree that the court found substantively modified the terms of a Forest Plan.[38] Such modification, the court reasoned, required the agency to proceed through the ordinary administrative process for Forest Plan amendments. Second, after a settlement has been entered, a later court can vacate the settlement in litigation challenging the settlement's terms. For example, in *Minard Run Oil Co. v. U.S. Forest Service*, the Third Circuit vacated a settlement under which the Forest Service had agreed to perform environmental review before allowing certain activities within a national forest. [39] The court again found that the decision to perform such review, which departed significantly from past practices, needed to be made through a notice-and-comment rulemaking.

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[36] Memorandum from Randolph D. Moss, Acting Assistant Attorney Gen., Office of Legal Counsel." *See* 2015 GAO REPORT, *supra* note 21, at 5.
to Raymond C. Fischer, Assoc. Attorney Gen., 23 OPINIONS OF THE OFFICE OF LEGAL COUNSEL 126, 128 (June 15, 1999); *see also* McVean & Pidot, *supra* note 14, at 208.

[37] 2015 GAO REPORT, *supra* note 21, at 6-7. That exception was granted to authorize a settlement under which EPA agreed to undertake two studies of water-borne pathogens not expressly required by the Clean Water Act and it was entered into only after EPA had lost before the district court. *Id.*

[38] Conservation Northwest v. Sherman, 715 F.3d 1181 (9th Cir. 2013).

[39] Minard Run Oil Co. v. U.S. Forest Serv., 670 F.3d 236 (3d Cir. 2011).

E. Misplaced Criticism of Environmental Settlements

Environmental settlements provide significant benefits and there already exist numerous safeguards to prevent agencies from misusing this litigation device. Nonetheless, some argue for new and aggressive limits on the government's ability to enter environmental settlements. Such limits will surely increase the cost to taxpayers because they will prolong litigation and result in higher fee awards. Moreover, I believe the concerns are misplaced. I'd like to explain why the two most common arguments against environmental settlements are not cause for concern.

First, the most potentially significant argument against environmental settlements, to my mind, is the claim that such settlements allow agencies to make decisions in secret without soliciting public input. If environmental settlements truly allowed circumvention of administrative law, this would be a concern. However, as I will explain, environmental settlements almost always involve decisions that would not be subject to public participation even if the decision was made outside of a settlement.[40] And where agencies do make decisions in environmental settlements that evade requirements for public participation, courts can, and do, intervene.[41]

The vast majority of environmental settlements involve decisions that agencies may freely make without engaging in any public process.[42] Most environmental settlements resolve deadline litigation, and through the settlement, the agency commits to making a decision—one that Congress has already mandated that the agency make—but does not commit to a particular outcome when it makes its decision by the agreed upon deadline. Such settlements essentially involve an agency deciding to allocate resources to complete a specified decisionmaking process.

[40] *See* McVean & Pidot, *supra* note 14, at 230-38.
[41] *See id.* at 236.
[42] *See id.* at 230-33.

Agency decisions to allocate resources and set priorities do not require public participation. Indeed, courts refer to resource allocation decisions as a quintessential matter of agency discretion.[43] As a result, an agency making such a decision through a settlement evades no public participation requirement, and, indeed under certain environmental laws, settlements processes involve public participation that would not otherwise be available because opportunities for public comment are incorporated into certain settlements processes.[44]

The same is true for other, rarer categories of settlements. On occasion, agencies enter settlements that commit to engaging in a particular procedure in making a decision.[45] For example, in *California Resource Agency v. U.S. Department of Agriculture*, a state agency and environmental groups filed a lawsuit alleging that the Forest Service had violated its procedural obligations in finalizing a forest plan.[46] After the district court ruled that the Forest Service had violated the law, the federal government entered into a settlement with the plaintiffs agreeing to engage in certain procedures as it reconsidered its forest plan. The Forest Service could always have decided to provide for additional process without soliciting public input, with or without a settlement. The APA explicitly exempts rules of agency procedure from public participation requirements,[47] and decisions about what procedures to use in making a specific decision are generally a preliminary aspect to an agency's decisionmaking process that is not independently

[43] *See, e.g.*, Oil, Chemical & Atomic Workers Union v. Occupational Safety & Health Administration, 145 F.3d 120, 123 (3d Cir. 1998).
[44] *See* McVean & Pidot, *supra* note 14, at 206-07; 2014 GAO REPORT, *supra* note 26, at 12. Moreover, as the Government Accountability Office found in a 2014 report examining settlements of deadline lawsuits brought under the Clean Air Act, those settlements include explicit and express language that "nothing in the settlement can be construed to limit or modify any discretion accorded EPA by the Clean Air Act or by general principles of administrative law." *See* 2014 GAO REPORT, *supra* note 26, at 9.
[45] *See* McVean & Pidot, *supra* note 14, at 233-35.
[46] California Resources Agency v. U.S. Department of Agriculture, Nos. 08-1185, 08-3884, 2009 W.L. 6006102 (N.D. Cal. Sept. 29, 2009).
[47] 5 U.S.C. § 553(b)(A).

subject to judicial review.[48] Moreover, as the *Minard Run* case demonstrates,[49] where an agency makes a procedural decision that a court believes should have been subjected to notice-and-comment rulemaking procedures, courts have ample authority to override the terms of the settlement.

Finally, agencies occasionally enter settlements that involve a commitment to a substantive position.[50] Often, these commitments regard preliminary matters that will become part of an agency decision subject to notice and comment rulemaking and eventually judicial review. In such a case, a reviewing court would consider the propriety and legality of the settlement at the time that the agency reaches a final decision.[51] If, for examples, a court finds that the terms of a settlement prejudged the outcome of an agency's decision, the court is likely to find the ultimate decision legally infirm. In rare situations an agency may attempt to enter a settlement that makes a final substantive decision that will not become part of another decisionmaking process.[52] Where the substantive decision involved in the settlement require public participation, the *Conservation Northwest* court demonstrates that courts are already well-equipped to detect and address the problem.

Because most settlements do not evade any public participation requirement and because courts already have ample authority to intervene in the rare circumstance where such evasion occurs, this critique of environmental settlements is unfounded.

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[48] *See, e.g.*, 5 U.S.C. 704 (authorizing judicial review of "final agency action").
[49] Minard Run Oil Co. v. U.S. Forest Serv., 670 F.3d 236 (3d Cir. 2011).
[50] *See* McVean & Pidot, *supra* note 14, at 235-38.
[51] The multi-species settlements between the Fish and Wildlife Service and the Center for Biological Diversity and Wildearth Guardians contained such a commitment. In those settlements, the agency agreed not to conclude that a listing of the species at issue was warranted by precluded by other priorities. *See* James J. Tutchton, *Getting Species on Board the Ark One Lawsuit at a Time: How the Failure to List Deserving Species Has Undercut the Effectiveness of the Endangered Species Act*, 20 ANIMAL LAW 401 426
[52] *See* McVean & Pidot, *supra* note 14, at 238.

A second argument critics make is that environmental settlements allow environmental groups to set the agenda for federal agencies.[53] This criticism also fails for the simple reason that it is Congress, not environmental groups, that have established the priorities that are being enforced through settlements. Congress has written environmental law to compel agencies to take action, and when agencies fail to take actions so required, litigation—from whatever the source—simply holds agencies accountable to their statutory mandates. Moreover, as discussed, settlements enhance, rather than reduce, the discretion of agencies in contrast to litigating a case to an unsuccessful conclusion that would result in the entry of injunctive relief against the agency. Finally, the resources required for agencies to satisfy their obligations under a settlement will have little impact on an agency's ability to pursue other priorities.[54]

CONCLUSION

Environmental settlements make good litigation sense. They make good policy sense. And they do not empower agencies to evade their legal responsibilities. Criticisms of environmental settlements, in my view, are simply criticism of the underlying substantive environmental statutes masquerading as concerns about litigation tactics. For example, complaints about the Fish and Wildlife Service's settlement of deadline litigation involving the listing of endangered species are not truly complaints about such settlements, but rather, a covert attempt to undermine the Endangered Species Act and prevent the Fish and Wildlife Service from carrying out its statutory obligation to list species as threatened or endangered where scientific evidence demonstrates that a listing is warranted. Similarly, complaints about the EPA's settlement of Clean Air Act litigation are not at core complaints about the settlement, but rather objections by certain interest groups to the terms of the Clean Air Act.

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[53] *See* ALEC REPORT, *supra* note 11, at 5.
[54] *See* 2014 GAO REPORT, *supra* note 26, at 16-17.

In other words, there is nothing broken about environmental settlements. There is no problem with settlement practices for Congress to fix. There is no record to substantiate claims that settlements are collusive. And if collusion were commonplace, as is sometimes suggested, surely information about those practices would have been leaked to the media. There is no record to substantiate claims that they enable agencies to avoid public participation. There is no record to substantiate claims that they enable private parties—environmental groups or industrial groups—to take over agencies.

The Department of Justice and the federal environmental agencies should retain discretion to settle litigation brought against the federal government, in just the way that any other party in civil litigation can settle a case if settlement is a better option than litigation. If Congress believes that the substance of environmental law needs to be adjusted, that is a debate that should occur in full daylight. Environmental litigation and environmental settlements should not be used as an underhanded attempt to remake the substance of environmental law.